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**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ARIZONA**

United States of America,  
  
Plaintiff,  
  
vs.

David Allen Harbour,  
  
Defendant.

Case No. 2:19-cr-00898-DLR (DMF)

**DEFENDANT’S BRIEF ON THE  
REBUTTABLE PRESUMPTION IN  
DETENTION HEARINGS**

Defendant, David Allen Harbour (“Defendant”), submits his Opening Brief on the  
“Rebuttable Presumption.”<sup>1</sup>

**BACKGROUND**

At the very end of the continued detention hearing, the Government argued that, because the grand jury had indicted Defendant for “mortgage fraud,” the statute raised a “rebuttable presumption” the defendant needed to overcome showing that he would not be an economic threat to the community.

**APPLICABLE LAW**

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<sup>1</sup> A Declaration from Harbour will be provided. It cannot accompany this filing due to the fact that absent an 88-mile round trip to CoreCivic, the only way to send or receive written papers to or from Harbour is via surface mail.

1 The issue is governed by the interplay between 18 U.S.C. § 3142(b) and  
 2 3148(b)(2), which provides in relevant part(s):

3 If there is probable cause to believe that, while on release, the person  
 4 committed a Federal, State, or local felony, a rebuttable presumption arises  
 5 that no condition or combination of conditions will assure that the person  
 6 will not pose a danger to the safety of any other person or the community.  
 7 If the judicial officer finds that there are conditions of release that will  
 8 assure that the person will not flee or pose a danger to the safety of any  
 9 other person or the community, and that the person will abide by such  
 10 conditions, the judicial officer shall treat the person in accordance with the  
 11 provisions of section 3142 of this title and may amend the conditions of  
 12 release accordingly.

13 The government circumvented the Court's *de novo* review of probable cause by  
 14 having the grand jury charge Defendant with mortgage fraud. As the government will  
 15 likely acknowledge almost every case involving "danger" is talking about a physical  
 16 danger; not an economic danger. Economic danger only applies in "some cases." *United*  
 17 *States v. Reynolds*, 956 F.2d 192 (9th Cir. 1992). A recent District Court case, *United*  
 18 *States v. Shields*, 2015 WL 900694 (February 24, 2015) noted that, while *Reynolds* was  
 19 short on definitions, *United States v. Provenzano*, 605 F.2d 85, 95 (3<sup>rd</sup> Cir.1975), was not  
 20 nearly so limited. If anything like the *Provenzano* standard applies, Defendant should be  
 21 released. Once the Defendant has rebutted the presumption, the ordinary considerations  
 22 of §1342(b) come into play.

### 23 ARGUMENT

24 I. Defendant poses no economic danger to the community, and the rebuttable  
 25 presumption under 18 U.S.C. § 3142(b) is easily met.

26 In *Reynolds*, the court cited to the 3<sup>rd</sup> Circuit's decision in *United States v.*  
 27 *Provenzano* for an instance where an individual poses an economic danger to the  
 28

1 community. 605 F.2d 85, 95 (3<sup>rd</sup> Cir.1975). Provenzano was found to pose an economic  
2 danger because of three preexisting economic crime *convictions*, not simply probable  
3 cause findings. *Id.* at 96. Additionally, had he been released, Provenzano retained a  
4 position within the community (the underworld) that would allow him to exert substantial  
5 influence.

7 *Reynolds* saw a similar situation to Provenzano in that the defendant had already  
8 been convicted. The court stated that the danger the defendant posed could include  
9 economic harm. 956 F.2d at 192. This, simply put, is not even remotely close to the  
10 situation of Harbour. Harbour is *charged* with a mortgage fraud in which every other  
11 participant will never be charged.

13 However, before delving into the weakness of the “new” case, we will first discuss  
14 “economic danger” as it applies and does not apply to Harbour. Before his arrest in  
15 December 2021, Harbour was both employed at Shea-Connelly Development, LLC  
16 (“SCD”) and was to participate with a percentage of the sales proceeds and development  
17 fees in a number of developments in the Valley orchestrated by Bart Shea along with the  
18 Santa Clarita property in California. Two things are certain: 1) Shea admits that Harbour  
19 was to participate in the development deals and 2) Shea contends that, having fired  
20 Harbour, his participation is ended and he will get nothing.<sup>2</sup> While it is yet to be seen  
21 whether Harbour’s participation in the Arizona development deals result in gains to offset  
22 the advances provided in 2021, it is clear that those issues will not be resolved any time  
23  
24  
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26 <sup>2</sup> Shea contends that Harbour was never supposed to participate in Santa Clarita, but this  
27 is false. However, since the Santa Clarita deal has *apparently* cratered, it may make no  
28 difference.

1 soon. Therefore, it may safely be said that Shea has cut-off Harbour. The money received  
2 for his benefit from Shea through loans to SCD by Daryl Deel no longer exists. Shea's  
3 termination of his relationship has coincided with Deels' complete abandonment of  
4 Harbour. Finally, Kenny Bobrow, formerly a father figure to Harbour (according to Shea)  
5 has also abandoned him, sued him, and, along with Shea, become a government witness  
6 against him.  
7

8 Harbour is, therefore, entirely bereft of funds and funding sources other than from  
9 his own family members. He is basically as much of an economic danger to the  
10 community as is the average homeless person. He has no job and no sources of income.  
11 He will live in Abby Harbour's parents' Fountain Hills home for free, if released. With  
12 the vehicle leased by SCD for the Harbour's having been surrendered, as this  
13 memorandum is written, the Harbours do not even have a car.  
14  
15

16 How then, can Harbour constitute an economic danger to the community? There is  
17 simply no way. He has no money and no property. There is no one from whom he can  
18 raise money other than from his own family.  
19

20 II. The Process Through Which the Presumption is Rebutted Militates in Favor  
21 of Setting Conditions of Release.

22 The rebuttable presumption allows a defendant to demonstrate that conditions of  
23 release exist that will ensure the safety of the community. We have proposed conditions,  
24 which will be supplied to the Court in a separate document, showing that this is so. *See,*  
25 *United States v. Dillon*, 938 F.2d 1412 (1<sup>st</sup> Cir. 1991); *Suppa*, 799 F.2d at 199; *United*  
26 *States v. Dominguez*, 783 F.2d 702, 706 n.7 (7<sup>th</sup> Cir. 1986); *United States v. Contreras*,  
27  
28

1 776 F.2d 51 (2d Cir. 1985); *United States v. Hazime*, 762 F.2d 34, 37 (6<sup>th</sup> Cir. 1985);  
 2 *United States v. Mosuro*, 648 F. Supp. 316, 318 (D.D.C. 1986).

3 A defendant must only produce *some* evidence to overcome the rebuttable  
 4 presumption. *Dillon*, 938 F.2d 1412, 1416. When a defendant produces such evidence,  
 5 the burden of persuasion remains with the government and the rebutted presumption  
 6 merely retains evidentiary weight. *Id.*; *See also United States v. Hir*, 517 F.3d 1081, 1086  
 7 (9<sup>th</sup> Cir. 2008) *holding that* “Although the presumption shifts a burden of production to  
 8 the defendant, the burden of persuasion remains with the government. A finding that a  
 9 defendant is a danger to any other person or the community must be supported by “clear  
 10 and convincing evidence.”

11  
 12  
 13 III. Section 3142(b) Suggests Release is Appropriate.

14 Once *some* evidence has been provided to rebut the presumption, the new  
 15 mortgage fraud offenses are bailable as a matter of right. The strength of the  
 16 government’s case is against Harbour is pitifully weak. 1) What was the fraud, if there  
 17 was one? It was the use of the \$100,000 gift letter at the closing; not anything else.<sup>3</sup> In  
 18 this regard, we cannot assume that there was a mortgage fraud at all. The evidence – e.g.,  
 19 Government Exhibit 70 – shows that Frank Madea, Equitable’s 100% owner, was,  
 20 obviously, the source of the demand for a gift letter. No one else would have demanded  
 21  
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24 <sup>3</sup> The \$242,000+ gift letter cannot not be shown to have been received by Equitable nor  
 25 can it be shown that Harbour sent it but, assuming it was received, it was received a full  
 26 month after the loan closed and sold to 5<sup>th</sup> Street Capital. Therefore, the \$242,000+ gift  
 27 letter was not material to the transaction. By way of contrast, the \$100,000 gift letter was  
 28 definitely received but who sent it cannot be known since Equitable does not retain  
 emails.

1 it. Why did he need the gift letter? Because he had already pre-sold the Shea loan to 5<sup>th</sup>  
 2 Street Capital. Obviously, he did not do that for free. As the District's premier mortgage  
 3 fraud prosecutor, this prosecutor knows that beyond peradventure.

4  
 5 There is nothing *per se* illegal about closing a loan with borrowed funds. Even  
 6 Fannie Mae permits it.<sup>4</sup>

7 The crime is mispresenting that the borrowed funds were a gift. But Equitable  
 8 could not have been a victim because it knew that the funds to close were not coming  
 9 from the buyer. We can see in Exhibit 70, the genesis of the idea for the gift letter. Where  
 10 did the idea *and* the gift letter template come from? From Frank Madea. So, Equitable is  
 11 not a fraud victim. Is 5<sup>th</sup> Street Capital? If so, it is Madea's and Equitable's victim. Was  
 12 Madea indicted? Kenny Bobrow signed the \$100,000 gift letter. Bobrow knew he had not  
 13 made a gift of \$100,000 to Shea. He loaned \$100,000 to Shea and another \$40,000 to  
 14 boot and Shea has acknowledged he will pay Bobrow back when the house sells. Was  
 15 Bobrow indicted?

16  
 17 Bart Shea admitted he had timely knowledge about the \$100,000 gift letter. He  
 18 said that Harbour brought it into his office, he threw him out, and told Harbour to "take  
 19 care of it." Take care of what and why? And what did Shea mean by "take care of it?" Is  
 20 Shea indicted? Where did he think the other \$200,000 came from? Our document  
 21 examiner said he "probably" signed the Gottschalk loan and he told Ashley Adams he  
 22 signed it. After all, where did Shea think the funds for closing came from? The tooth

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23  
 24  
 25  
 26 <sup>4</sup> "Borrowed funds secured by an asset are an acceptable source of funds for the down  
 27 payment, closing costs, and reserves, since borrowed funds secured by an asset represent  
 28 a return of equity.") (Fannie Mae Selling Guide, B3-4.3-15: 10/30/2009).

1 fairy? Shea stood to clear \$3 million from the purchase, renovation, and sale that he  
2 would share 50/50 with Ken Akimoto. Madea was going to make money on the sale of  
3 the note to 5<sup>th</sup> Street Capital. The real estate agents would make their money. Every  
4 single participant in the 2123 Georgia Property except Harbour was going to get money  
5 from the transactions but only Harbour is indicted. The government's mortgage fraud  
6 case, though creatively and excessively pleaded, is very, very weak and it can never  
7 improve. It is noteworthy that the only interview of Madea produced was the October 1<sup>st</sup>  
8 interview. We assume that his counsel has told him to stop talking. He is, after all, the  
9 most likely suspect in a mortgage fraud.  
10  
11

12 Harbour came here with his parents. His father passed but his mother remained.  
13 His sister and family live here. His wife, whose medical issues are known, and the  
14 Harbour's two daughters, 11 and 8, live here. He is a member of the Phoenix  
15 Thunderbirds was formerly on the Fiesta Bowl Committee, attends St. Thomas the  
16 Apostle and has a long association with its school. He engaged in philanthropy when he  
17 was able. As Bobrow told the agents, he and Abby are fabulous parents. His sole ties are  
18 to this community. He is, obviously, not a flight risk and his loss of sources of money,  
19 already explained, must reverse any notion that he is a flight risk or a danger. Go where?  
20 Using what?  
21  
22

23 Harbour has every reason to fight this case and, while anything can happen, my  
24 51+ years in criminal law and 40+ in white collar work strongly suggests the government  
25 has completely misunderstood this case. It is time to release Harbour. He is no danger to  
26 anyone or anything.  
27  
28

1 RESPECTFULLY SUBMITTED this 27th day of June 2022.

2 CHRISTIAN DICTER & SLUGA, P.C.

3  
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11 **CERTIFICATE OF SERVICE**

12 I hereby certify that on June 27, 2022, I electronically transmitted the attached  
13 document to the Clerk's Office using the CM/ECF system for filing and for transmittal  
of Notice of Electronic Filing to the following CM/ECF registrants:

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